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Mahfar bin Alwee v Jejaka Megan Sdn Bhd & Anor

B HIGH COURT (MELAKA) — CIVIL SUIT NO MT1–22–40 OF 2002
LOW HOP BING J
18 OCTOBER 2006

C *Civil Procedure — Affidavits — Affidavit in reply — Failure to file — Whether defendant lost right to object to plaintiff's application — Whether defendant at liberty to be heard on law*

D *Civil Procedure — Discovery — Application for production of documents — Whether documents based on contract relevant — Plaintiff's cause of action based on fiduciary duties and implied trust — Plaintiff bore burden of proving relevancy*

E The plaintiff prayed for an order requiring the first and second defendants to produce, at the office of the plaintiff's solicitors, documents for the plaintiff to make notes and copies thereof upon payment of reasonable fees, and in the event of the defendants' failure to comply therewith, to strike out the defence and enter judgment for the plaintiff. Six plaintiffs, including the plaintiff had filed six separate civil suits against the defendants. These suits were consolidated. The plaintiff's affidavit in support averred that he was the purchaser of a low cost house in a housing project F for which he had paid RM23,782 representing 60% of the purchase price. The housing project had since been abandoned but was subsequently taken over by the first defendant ('D1') to whom the second defendant ('D2') has given a loan of RM5.2m with a view to rehabilitation, completion and delivery of vacant possession to the purchasers including the plaintiff. The plaintiff alleged that D1 had completed the project but had instead sold the plaintiffs house to a third party. The plaintiff has G commenced the instant suit as an equitable and beneficial owner of the house. In the defence, both the defendants denied any responsibility or trust in favour of the plaintiff. The plaintiff submitted that by reason of the first defendant's failure to file an affidavit in reply, the first defendant has lost the right to object to the plaintiffs application. D1 contended that the documents sought by the plaintiff were not H relevant to the plaintiffs cause of action which was not based on contract but on breach of fiduciary duties and implied trust.

Held, dismissing plaintiff's application with costs:

I (1) Notwithstanding the absence of an affidavit in reply by D1, D1 was at liberty to rely and be heard on the law for the purpose of launching an objection to the plaintiffs application. Hence, the plaintiff's application and Dl's objection thereto must be heard on merits (see paras 14–15).

(2) It was apparent that the sole question for determination in the instant application was whether the documents sought by the plaintiff were relevant to his cause of action. In this regard, the plaintiff bore the burden of proving relevancy (see para 21).

(3) Since the documents sought by the plaintiff were essentially documents founded upon the law of contract; the judge was unable to find any relevance of these documents when the plaintiff's cause of action was not founded on contract but on fiduciary duties and implied trust (see para 23).

[Bahasa Malaysia summary

Plaintif memohon satu perintah mengkehendaki defendan pertama dan defendan kedua mengemukakan, di pejabat peguamcara plaintif, dokumen-dokumen untuk plaintif mengambil nota-nota dan salinan-salinan daripadanya atas bayaran satu fi yang berpatutan, dan sekiranya defendan-defendan gagal mematuhinya, untuk membatalkan pembelaan dan memasuki satu penghakiman untuk plaintif. Enam plaintif-plaintif, termasuk plaintif telah memfailkan enam tindakan sivil secara berasingan terhadap defendan-defendan. Kesemua tindakan-tindakan ini digabungkan. Afidavit sokongan plaintif menyatakan bahawa beliau adalah pembeli satu rumah kos rendah di satu projek perumahan dimana beliau telah membayar RM23,782 yang mewakili 60% harga jualan tersebut. Projek perumahan semenjak itu telah terbengkalai tetapi selepas itu diambilalih oleh defendan pertama ('Dl') di mana defendan kedua ('D2') telah diberi pinjaman sebanyak RM5.2j untuk menghidupkannya kembali, menyelesaikannya dan menghantar-serah milikan kosong kepada pembeli-pembeli termasuk plaintif. Plaintif menyatakan bahawa D1 telah menyelesaikan projek tersebut akan tetapi telah menjualkan rumah-rumah plaintif kepada pihak ketiga. Plaintif telah memulakan tindakan ini sebagai pemilik benefisial dan dalam ekuiti rumah tersebut. Dalam pembelaan, kedua-dua defendan menafikan sebarang kewajipan atau amanah yang memihak kepada plaintif. Plaintif menghujahkan atas alasan kegagalan defendan pertama memfailkan afidavit jawapan, defendan pertama telah kehilangan haknya untuk membantah permohonan plaintif. D1 menyatakan dokumen-dokumen yang dipohon oleh plaintif adalah tidak relevan kepada kausa tindakan plaintif-plaintif yang tidak berdasarkan atas kontrak tetapi atas perlanggaran kewajipan fiduisari dan amanah tersirat.

Diputuskan, menolak permohonan plaintif dengan kos:

(1) Walaupun tiada afidavit balasan oleh D1, D1 berhak bergantung dan didengar atas undang-undang untuk tujuan melancarkan satu bantahan terhadap permohonan plaintif-plaintif. Dengan itu, permohonan plaintif dan bantahan D1 akan didengar atas merit (lihat perenggan 14–15).

(2) Adalah jelas bahawa soalan tunggal yang perlu ditentukan dalam permohonan ini ialah samada dokumen-dokumen yang dipohon oleh plaintif adalah relevant kepada kausa tindakannya. Dalam keadaan ini, plaintif mempunyai beban menunjukkan ia adalah relevan (lihat perenggan 21).

(3) Ia harus diambil perhatian bahawa dokumen-dokumen yang dipohon oleh plaintif kebanyakkannya adalah dokumen-dokumen yang berasaskan kontrak undang-undang; dan saya tidak dapat mencari sebarang relevan dokumen-dokumen ini apabila kausa tindakan plaintif-plaintif bukannya berasaskan kontrak tetapi perlanggaran kewajipan fiduisari dan amanah tersirat (lihat perenggan 23).]

Notes

For cases on affidavit in reply, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 321–324.

For cases on application for production of documents, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 2177–2187.

Cases referred to

Abdul Razak Ahmad v Majlis Bandaraya Johor Bahru [1995] 2 MLJ 287 (refd)
Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd [1985] SCR 353 (refd)
Dawkins v Prince Edward of Saxe Weimar [1875-76] 1 QBD 499 (refd)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd)
Yekambaran s/o Marimuthu v Malayawata Steel Berhad [1994] 2 CLJ 581 (refd)

Legislation referred to

Rules of the High Court 1980 O 3 r 6, O 18 r 19(1)(a), (b), (c), O 24 rr 1(1), 10(1), (2), 11(1), O 81, O 92 r 4

Mogan Karupiah (Mogan Karupiah) for the plaintiff.
Bala Gopal (Bala Gopal & Associates) for the first defendant.
Lu Kee Chee (Rashid & Lee) for the second defendant.

Low Hop Bing J (now JCA):

APPLICATION

[1] The plaintiff vide application by way of summons in chambers in encl (30) has originally sought a variety of orders, but has subsequently prayed for an order requiring the first and second defendants to produce, at the office of the plaintiffs solicitors, documents for the plaintiff to make notes and copies thereof upon payment of reasonable fees, and in the event of the defendants' failure to comply therewith, to strike out the defence and enter judgment for the plaintiff.

FACTUAL BACKGROUND

[2] Six plaintiffs, including the plaintiff herein, have on 15 February 2002 filed six separate civil suits against the defendants. These suits were consolidated on 22 May 2003.

[3] The parties have consented to treat the decision in the instant suit as binding on the other five suits.

[4] The plaintiffs affidavit in support averred that he was the purchaser of a low cost house in a housing project for which he had paid RM23,782 representing 60% of the purchase price. The housing project has since been abandoned but was subsequently taken over by the first defendant ('D1') to whom the second defendant ('D2') has given a loan of RM3.2m with a view to rehabilitation, completion and delivery of vacant possession to the purchasers including the plaintiff.

[5] The plaintiff alleged that D1 had completed the project but had instead sold the plaintiffs house to a third party. The plaintiff has commenced the instant suit as an equitable and beneficial owner of the house.

[6] In the defence, both the defendants denied any responsibility or trust in favour of the plaintiff.

[7] On 5 March 2003, pursuant to O 24 r 10 of the Rules of the High Court 1980, the plaintiff served on Dl's solicitors a notice to produce, inter alia, the following documents:

(i) order of the court dated 15 September 1992 in Melaka High Court SP 24–205 of 1991;

(ii) transfer Form from Lock Kim Lian to D1;

(iii) D1's application to D2 for a term loan repayable with interest for 18 months;

(iv) agreement;

(v) letter dated 1 October 1996;

(vi) agreement between D1 and D2; and

(vii) D1's letter of offer to plaintiff.

On 5 March 2003, also pursuant to O 24 r 10, the plaintiffs solicitors served on D2's solicitors a notice to produce a variety of documents including:

(i) agreement between D1 and D2;

(ii) Evaluation Report Reference No 'TPPT/A-025/HQ 0074' by Ernst & Young;

(iii) debenture between D1 and D2;

(iv) Deed of Assignment between D1 and D2; and

(v) first charge by D1.

D1'S RIGHT TO OBJECT

[8] Mr Mogan Karupiah learned counsel for the plaintiff submitted that by reason of D1's failure to file an affidavit in reply, D1 has lost the right to object to the plaintiffs application herein, relying on:

(i) *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 (CA);

(ii) *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1985] SCR 353 (SC); and

(iii) *Abdul Razak Ahmad v Majlis Bandaraya Johor Bahru* [1995] 2 MLJ 287 (HC).

D1's learned counsel Mr Bala Gopal has deemed it unnecessary to reply to the above submission.

[9] The merits of the plaintiff's submission will no doubt be apparent after my analysis of the authorities referred to above.

[10] First, in *Ng Hee Thoong*, the two appellants-guarantors ('the guarantors') gave their address in the guarantee as 83, Jalan Iskandar, Ipoh. Their liability depended on the making of demand upon them by the respondent-bank ('the bank'). Upon default of payment, the bank sent a letter of demand, addressed to the first guarantor at 86, Jalan Theatre Ipoh while that addressed to the second guarantor bore the address of No 5, Jalan Chung Ah Moi, Chateau Garden, Ipoh. Hearing nothing from the guarantors, the bank issued a writ and statement of claim against, inter alia, the guarantors and obtained judgment in default of appearance against them. Subsequently, the guarantors succeeded in applying to set it aside, and then delivered their defence. About 15 months later, the bank took out a summons for summary judgment, to which the guarantors opposed by way of an affidavit asserting that they had not received any demand from the bank and that the bank had not given them one month's notice of intention to proceed as required under O 3 r 6 in view of the delay exceeding one year since the last proceedings. The bank did not file any affidavit in reply.

[11] The Court of Appeal through the judgment of Gopal Sri Ram JCA at p 286D–E referred to Alloy Automotive, supra, and set out the well settled principle, governing the evaluation of affidavit evidence, that where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict it is usually treated as an admission by him of the fact so asserted.

Alloy Automotive concerns the respondent's (plaintiff's) application for specific performance by way of summary judgment under O 81. The appellant (defendant) in opposing the application filed an affidavit setting out the facts relating to the variation of the sale and purchase agreement to which the plaintiff did not answer. On this issue, Lee Hun Hoe CJ (Borneo) (as he then was) speaking for the Supreme Court at p 358e held that an affidavit must reply specifically to allegations, and if it does not, then those allegations not replied to must be taken to have been accepted, citing *Dawkins v Prince Edward of Saxe Weimar* [1875–76] 1 QBD 499 per Blackburn J.

[12] In *Abdul Razak Ahmad*, the plaintiff filed an originating summons seeking declaratory reliefs. The defendant filed an affidavit to which the plaintiff did not reply. The defendant then filed an application by way of summons in chambers to strike out the plaintiff's originating summons on the grounds, inter alia, that the plaintiff's failure to file an affidavit in reply to that filed by the defendant was fatal and the court should exercise its discretion under O 92 r 4. At p 293D–F Abdul Malik Ishak J also followed *Alloy Automotive* and held, inter alia, that as the whole

case had to be decided on affidavit evidence alone, the plaintiff should have filed an affidavit in reply, and that the plaintiff's failure to do so meant that he had admitted to the defendant's allegations.

[13] The principle which has been enunciated with unrivalled clarity in all the abovesaid three authorities does not appear to be so broad or extensive as to lend any support to the defendant's abovesaid proposition.

[14] Notwithstanding the absence of an affidavit in reply by D1, I am of the view that D1 is at liberty to rely and be heard on the law for the purpose of launching an objection to the plaintiff's application.

[15] Hence, I hold that the plaintiff's application and D1's objection thereto must be heard on merits.

DISCOVERY AND INSPECTION OF DOCUMENTS

[16] It was submitted for the plaintiff that the plaintiff's action was against D2 as a public company entrusted with public funds carrying out public duties of a fiduciary nature, relying on:

(i) O 24 r 1(1), r 10 (1) and (2) and r 11(1);

(ii) *Yekambaran s/o Marimuthu v Malayawata Steel Berhad* [1994] 2 CLJ 581 (HC); and

(iii) my judgment in Melaka High Court Civil Suit MT1–22–40 of 2002 on encl (21) herein which was delivered on 19 March 2004 ('my judgment on encl (21)').

[17] D1 contended that the documents sought by the plaintiff were not relevant to the plaintiff's cause of action which was not based on contract but on breach of fiduciary duties and implied trust.

[18] Learned counsel for D2, Miss Lu Kee Chee argued, inter alia, to the same effect in that the plaintiff's claim against D2 is founded on equity ie implied trust and equitable principles.

[19] I would first of all set out the principles governing the grant or refusal of an order for the discovery and inspection of documents under O 24, as follows:

(i) After the close of pleadings in an action begun by writ there shall, subject to and in accordance with the provisions of O 24, be discovery by the parties to the action of the documents which are or have been in their possession, custody or power relating to matters in question in the action: O 24 r 1(1); *Yekambaran* per Edgar Joseph Jr (later FCJ);

(ii) Any party to a cause or matter shall be entitled at any time to serve a notice in Form 43 on any other party in whose pleadings or affidavits reference is

made to any document requiring him to produce that document for the inspection of the notice giver and to permit him to take copies thereof: O 24 r 10(1);

(iii) The party on whom a notice is served under O 24 r 10(1) must, within four days after serving of the notice, serve on the notice giver a notice in Form 44 stating a time within seven days after the service thereof at which the documents or such of them as he does not object to produce, may be inspected at a place specified in the notice, and stating which (if any) of the documents he objects to produce and on what grounds: O 24 r 10(2);

(iv) If a party who is served with a notice under O 24 r 10(1) —

(a) fails to serve a notice under O 24 r 10(2); or

(b) objects to produce any document for inspection; or

(c) offers inspection at a time or place such that in the opinion of the court it is unreasonable to offer inspection then or, as the case may be, there,

then, subject to O 24 r 3(1), the court may, on the application of the party entitled to inspection, make an order in Form 45 for the production of the documents in question for inspection at such time and place, and in such manner, as it thinks fit: O 24 r 11(1).

(v) Edgar Joseph Jr J (later FCJ) in *Yekambaran* enunciated that the essential elements of an order for discovery are threefold viz:

(a) there must be a 'document';

(b) the document must be 'relevant; and

(c) the document must be or have been in the 'possession, custody or power' of the person against whom the order for discovery is sought; and

(vi) our Rules of the High Court 1980 limit discovery to documents which are relevant to or relate to the factual issues in dispute.

[20] Of all the above principles, the most significant are principles (5)(b) and (6) which I hereby apply.

[21] Reverting to the above submissions, it is apparent to me that the sole question for determination in the instant application is whether the documents sought by the plaintiff are relevant to his cause of action. In this regard, I am of the view that the plaintiff bears the burden of proving relevancy.

[22] For this purpose, I shall refer to my judgment on end (21) in relation to D2's summons in chambers which sought to strike out the plaintiff's writ and statement of claim herein under O 18 r 19(1)(a), (b) or (c). In essence, I held that D2 owed fiduciary duties to the plaintiff to carry out the housing project to completion and subsequent delivery thereof to the purchasers including the plaintiff, as a result of which the plaintiff's statement of claim had disclosed a reasonable cause of action

based on an implied trust in favour of the plaintiff, thereby saving the plaintiff's claim from being struck out under O 18 r 19(11)(a), (b) or (c).

[23] It is to be noted that the documents sought by the plaintiff are essentially documents founded upon the law of contract; and I am unable to find any relevance of these documents when the plaintiff's cause of action was not founded on contract but on fiduciary duties and implied trust. The plaintiff's application is therefore without any merit.

CONCLUSION

[24] On the foregoing grounds, I dismiss the plaintiff's application with costs.

Plaintiff's application dismissed with costs.

Reported by Sally Kee